Office-Supreme Court, U.S.
FILED
MAY 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1720

IN THE

Supreme Court of the United States

October Term, 1980.

PEOPLE VERSUS PORN (Profit of Richard Nixon), *et al.*,
Petitioners,

vs.

RICHARD MILHOUS NIXON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RICHARD NIXON IN OPPOSITION.

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Questions Presented.

1. (Assuming petitioners have not abandoned the issue in the court of appeals), does a former President have a right to remove a State court action to the district court where the claim for relief asserted in the State court purportedly arises from the federal officer's breach of fiduciary duty to federal taxpayers in violation of his federal Constitutional oath of office?

2. Do federal citizens and taxpayers have standing to sue a former President derivatively for the financial benefit of the United States on a claim of breach of fiduciary duty where the complaint: (i) fails to allege a claim-related violation of the taxing and spending power, (ii) does not disclose a prior request that the United States assert the claim directly in its own name, and (iii) fails to join the Attorney General as a party?

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vs.

RICHARD MILHOUS NIXON,
Respondent.

BRIEF FOR RICHARD NIXON IN OPPOSITION.

Parties.

The parties to this case are correctly stated on the second unnumbered page of the amended petition for writ of certiorari, received by the Clerk on 14 April 1981 and by counsel for respondent on 21 April 1981.

Opinion Below.

The decision of the court of appeals, a memorandum rather than an opinion (Amended Pet., p. 21), is unreported (Rule 21(a), Ninth Circuit Rules).

Jurisdiction.

The judgment of the court of appeals was entered on 5 December 1980. The jurisdiction of this Court is invoked by petitioners under 28 U.S.C. §1254(1).[1]

Statement.

Petitioners, a nonprofit corporation and two individual federal taxpayers, filed an action for money damages and an accounting against the former President of the United States in the superior court of the State of California for the county of Santa Clara on 4 May 1978 (Amended Pet., pp. 22-32). The complaint sought relief in the name of the federal treasury and not for the individual benefit of the plaintiffs. On 13 July 1978, Mr. Nixon filed a timely petition for removal of the case to the district court in San Francisco, together with a bond on removal (Appellee's Brief below, p. 2).[2] On 18 July 1978, Mr. Nixon moved in the district court to dismiss the action on several grounds, including: (i) lack of subject matter jurisdiction, (ii) failure to state a claim upon which relief might be granted, and (iii) failure to join a party under Rule 19, F.R.Civ.P.

Thereafter, petitioners moved in the district court for an order remanding the action to the State court. After the cross motions had been briefed and argued orally, the district court (the late Hon. Albert C. Wollenberg) denied petition-

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[1]By letter dated 21 April 1981, the Clerk has advised counsel for respondent that the original petition was received by the Clerk on 5 March 1981 and returned to petitioners' counsel because the petition did not comply with Rule 33. An amended petition was received by the Clerk on 14 April 1981. Respondent's counsel in Los Angeles did not receive the amended petition from petitioners' counsel, or at all, until 21 April 1981.

[2]The facts cited hereinbelow are taken from the Brief for Appellee which was filed in the Ninth Circuit. A copy of that brief is being lodged concurrently with the Clerk of this Court. The facts appear in Mr. Nixon's brief below at pages 1-7.

ers' motion to remand and granted Mr. Nixon's motion to dismiss (Amended Pet., pp. 17-20). Petitioners took a timely appeal to the Ninth Circuit from the judgment of dismissal. On 5 December 1980, the court of appeals affirmed the judgment of dismissal in an unpublished memorandum decision (per Wright, Choy, and Ferguson, Circuit Judges) (Amended Pet., p. 21).

In their opening brief in the Ninth Circuit, petitioners failed to specify any error in respect to the district court's denial of petitioners' motion to remand the action to the State court.[3]

In their complaint, petitioners purport to sue for money on behalf of all taxpayers, including themselves, who paid taxes to the United States at any time after July, 1972. Their claim sounds in tort — breach of fiduciary duty — arising from an asserted trust and fiduciary relationship between Mr. Nixon, in his former capacity as President of the United States, and the taxpayers. The trust, petitioners allege, came into being when Mr. Nixon "willingly and voluntarily took the oath of office as President of the United States as prescribed in Section 1, Clause 5 of Article II of the Constitution of the United States."[4]

From that oath and the obligations attendant to the federal office, petitioners claim that an express trust came into being — with the former President as trustee and the federal tax-

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[3]See generally: Appellant's [sic] Opening Brief, etc., filed in the Ninth Circuit, esp. at p. 1; Brief for Appellee, p. 7, fn. 3; and Appellants' Closing Brief, etc., pp. 8-10.

[4]Petitioners, doubtless, meant to refer to Art. II, §1, cl. 8, which reads:

> "Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.' "

payers as beneficiaries — under the law of the State of California (Calif. Civil Code, §§2228-2231, 2234, 2237-2238). In alleged violation of that State-created trust relationship, petitioners contend, the former President concealed from petitioners and other federal taxpayers "information about such facts known to said defendants with regard to Watergate and which have been subsequently, and within three years last past, sold to certain television networks, promoters, producers, newspaper publishers, magazine publishers, book publishers, dealers and distributors and others for profit [in violation of California law]." (Amended Pet., pp. 27-28).

Petitioners seek an accounting of Mr. Nixon's profits for the benefit of the Treasury after an allowance therefrom for petitioners' lawyers' fees in this case. In addition, petitioners seek punitive damages in an amount equal to 20% of Mr. Nixon's net worth.

ARGUMENT.

1. Petitioners Abandoned Their Attack Upon the Removal of the State Action to the District Court When They Failed to Specify in Their Opening Brief in the Ninth Circuit Any Error in the District Court's Denial of Petitioners' Motion to Remand the Case to State Court.

The first question presented in the amended petition was not properly preserved below in the direct appeal from the judgment in the district court. Petitioners now urge that they should have been allowed to pursue their complaint in the California courts — that their claims were based solely upon State law — and for that reason it was error for the district court to have denied petitioners' motion to remand (Amended Pet., pp. 4-11). This issue is not available to petitioners in this Court, because they failed to urge it in the Ninth Circuit in their opening brief. Indeed, in the court of appeals, petitioners did not rely exclusively on California law as their source of the rules of primary conduct for respondent. Instead, they argued both federal and California law, implicitly conceding that their State court complaint presented a federal question which justified removal.[5]

By eschewing the removal issue and limiting their appeal below to the question of their standing to sue *in federal court* as taxpayers, petitioners abandoned their right to urge in this Court that the district court erred in refusing to remand

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[5]Petitioners began their opening brief in the Ninth Circuit with this statement under the heading "ISSUES AND ARGUMENT" (p. 1):

> "Each of the Appellants is a beneficiary of the public trust and a fiduciary duty *now accepted as arising out of federal common law*, as well as statutory and case law of the State of California." [italics added]

The burden of the opening brief in the Ninth Circuit was that petitioners had standing to sue Mr. Nixon in the district court. Petitioners no longer pressed the removal/remand issue.

the case to the California superior court. Rules 28(a)(2) and (a)(4), F.R.App.P.; *Peck v. Shell Oil Co.*, 142 F.2d 141, 143 (9th Cir. 1944). Absent extraordinary circumstances which do not appear in this record, this Court will not review an issue which was not raised by the petitioners in the court below. *Lawn v. United States*, 355 U.S. 339, 362 n. 16, 78 S.Ct. 311, 324 n. 16 (1958). Cf. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401 (1976); *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 1471 n. 2 (1980).

In view of the fact that the Ninth Circuit chose to speak to the remand issue, we will address the question on the merits.[6]

2. Respondent Had Two Statutory Bases for Removal of This Federal Question Action: Remand Was Properly Denied.

Cutting through the complaint's irrelevant citations to the statutory trust law of California — and without regard to whether the action had been filed initially in federal court or was removed there by the defendant — the complaint presents a uniquely *federal* question: Whether the status of the occupant of the office of President of the United States and the incidents of the oath of that office, which is prescribed by the Constitution of the United States, create a derivative claim for money damages which may be enforced in the courts by federal taxpayers for the benefit of the federal Treasury? Such a federal question immediately triggers the removal statute. 28 U.S.C. §§1331 and 1441; *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L.Ed.

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[6]The Ninth Circuit said (Amended Pet., p. 21):

"The denial of plaintiffs' motion to remand was correct. The right of removal was absolute. *Willingham v. Morgan*, 395 U.S. 402 (1968)."

204 (1824); *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773 (1946).

There is a second ground for removal on the facts alleged in the complaint. Mr. Nixon is a former federal officer who is being sued for tort allegedly committed during, and in connection with, the execution of his former federal office. In such circumstances, Congress has conferred jurisdiction upon the district courts to accept removal of that action so that present and former federal officers — and the Government — will be assured of uniform interpretation of the rules governing the performance of federal official duty. 28 U.S.C. §1442(a)(1); *Willingham v. Morgan,* 395 U.S. 402, 89 S.Ct. 1813 (1969); *Camero v. Kostos,* 253 F.Supp. 331, 334-335 (D.N.J. 1966).

* * *

Petitioners seemingly ignore the jurisdictional statutes and contend, without legal authority, that removal should not have been allowed, because petitioners want a California court to adjudicate petitioners' theory that the President of the United States, acting in his official capacity, is regulated by the disparate rules of primary conduct announced by the 50 States for trustees of express trusts (Amended Pet., pp. 4-8). They do not explain why California's version of the law for private fiduciaries should have any more relevance to this federal taxpayers' claim than the law of any other State. Nor do petitioners even attempt to describe a rational system of choice of law rules which would allow a court to determine which State's law would govern the official conduct of the President of the United States.

Petitioners' reliance on the trial court decision in New York is entirely misplaced (Amended Pet., pp. 8-10).[7] The

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[7] *Jenkins v. The New York Times and H.R. Haldeman,* N.Y. Supr. Ct., No. 3106-78; S.D.N.Y. No. 78 Civ. 1451.

gravamen of that complaint was a criminal conviction which triggered application of a New York statute that did not depend upon the defendant's former status as a federal officer: Section 632-a, Chapt. 823, Laws of 1977 (N.Y.) (Amended Pet., pp. 46-49).

Further, petitioners' assertion that their complaint did not invoke federal question jurisdiction by its reference to the Constitutional oath of office (Amended Pet., pp. 11-12) is groundless. The gravamen of the complaint is the alleged breach of a fiduciary duty to federal taxpayers which existed, if at all, solely by reason of respondent's former status as President. If all reference to Mr. Nixon's official position were deleted from the complaint, there would be no colorable claim for relief stated in the pleading.

3. Petitioners Lack Standing to Sue.

The theory of standing which petitioners advocate is based upon a misapprehension of the federal taxpayer standing-to-sue cases.[8] Petitioners do not allege any wrongful exercise by the Government of the taxing and spending power (Amended Pet., pp. 12-13). Cf. *Flast v. Cohen, supra,* fn. 8. Rather, petitioners contend that the Government *properly* expended funds to investigate Watergate. Petitioners want respondent to reimburse the Treasury for those *proper* expenditures.

Also, petitioners have not alleged any facts which might invest them with the power as federal taxpayers and citizens to sue derivately for the United States in order to seek money damages for the federal Treasury. Decisions of the courts

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[8]See, *e.g.*, *Flast v. Cohen*, 392 U.S. 82, 88 S.Ct. 1942 (1968); *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597 (1923); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925 (1974); *United States v. Richardson*, 418 U.S. 166, 170-179, 94 S.Ct. 2940, 2943-2948 (1974). See also: *Duke Power Co. v. Carolina Environ. Study*, 438 U.S. 59, 98 S.Ct. 2620, 2633-2634 (1978).

of California and Illinois involving suits brought by State taxpayers are not illuminating on this issue (Amended Pet., pp. 5-6, 13-14). Until their action had been dismissed in the district court (Amended Pet., pp. 17-20), petitioners not only did not allege that they had requested the Attorney General to bring this claim in the name of the United States (Amended Pet., pp. 22-32), but also, petitioners did not even request the Government to bring this claim until after the civil action had been dismissed by the district court (Amended Pet., pp. 33-35).

Federal taxpayers may not sue in tort derivatively for the financial benefit of the United States. Congress has committed to the discretion of the Executive Branch — and in particular to the Attorney General — the function of managing and prosecuting all claims of the United States. See, *e.g.*, 28 U.S.C. §§511, 512, 514, 515(a), 516, and 519; *United States v. State of California,* 332 U.S. 19, 26-27, 67 S.Ct. 1658, 1662-1663 (1947); *United States v. Silliman,* 167 F.2d 607, 610-611 (3d Cir. 1948), *cert. den.* 335 U.S. 825, 69 S.Ct. 48 (1948); *Senate Select Com. on Pres. Campaign Activities v. Nixon,* 366 F.Supp. 51, 56 (D.C.D.C. 1973).

4. Independent Grounds to Sustain the Dismissal.

In addition to each of the jurisdictional failings, petitioners' complaint was properly dismissed for other reasons which the district court never had to reach.[9]

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[9]On appeal, a judgment should be affirmed if it is supported by any legal ground, whether or not it was passed upon by the trial court. *California Bankers Association v. Schultz,* 416 U.S. 21, 71, 94 S.Ct. 1494, 1522 (1974); *Jaffke v. Dunham,* 352 U.S. 280, 281, 77 S.Ct. 307, 308 (1957); *Securities and Exchange Com. v. Chenery Corp.,* 318 U.S. 80, 88, 63 S.Ct. 454, 459 (1943); *Helvering v. Pfeiffer,* 302 U.S. 247, 251, 58 S.Ct. 159, 160 (1937).

First, the Attorney General was an indispensable party to this action who might have been joined under Rule 19, F.R.Civ.P. Petitioners simply elected not to join him. As the official charged by Congress with the duty to manage and to prosecute all claims of the United States, it was essential that the Attorney General be bound by the judgment in this action. Cf. *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 738 (1970); *Price, Trustee v. Gurney*, 324 U.S. 100, 105, 65 S.Ct. 513, 516 (1945); *Tryforos v. Icarian Development Company, S.A.*, 518 F.2d 1258, 1264-1265 (7th Cir. 1976), *cert. den. sub nom. Manta v. Tryforos*, 423 U.S. 1091, 96 S.Ct. 887 (1976); *Stevens v. Loomis*, 334 F.2d 775, 778 (1st Cir. 1964); *Greenberg v. Giannini*, 140 F.2d 550, 554 (2d Cir. 1944) (per L. Hand, C.J.).[10]

Second, the complaint failed to state a claim upon which relief could be granted. No facts were alleged that respondent was a trustee, that a trust *res* existed at the time respondent took the Presidential oath, or that any trust existed while respondent occupied the office of President. In these circumstances the metaphor of a public office being a public trust will not suffice to apply trust law principles to a taxpayer action for money. Cf. *In re New Statehouse*, 37 Atl.

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[10]Learned Hand said in *Greenberg v. Giannini, supra*:

> "As for Giannini's motions to dismiss the complaints in both actions, it has been settled law for over a century * * * that the wronged corporation is an indispensable party to a shareholders' action. * * * It is hornbook law that the claim is the corporation's, and for that reason the delinquent directors will not be protected by any judgment which does not conclude the corporation. If they succeed in defeating the action, other shareholders may bring another; if the recovery is too little, the same thing is possible." [citations omitted].

Petitioners are suing derivatively for the corporate benefit of the United States but the United States could not be concluded by the judgment in this case, because the United States was not brought before the court.

2, 4 (R.I. 1897). See: A.L.I., *Restatement of the Law, Trusts, Second*, §2, p. 2 (1959); *op. cit.* at pp. 10-11. The funds which petitioners wish to subject to a trust did not come into existence until after respondent left office (the complaint alleges that the proceeds of the sale of the literary and performance rights came into existence within three years of the filing of the complaint — 4 May 1978 — which was after respondent left office in August, 1974). Since there was no trust *res* during the existence of the alleged fiduciary relationship, there could have been no trust. See, *e.g.*, B.E. Witkin, 7 *Summary of California Law* (8th ed. 1974), Trusts §20, at p. 5383; A.W. Scott, 1 *Scott on Trusts* (3d ed. 1967), §74; G.G. and G.T. Bogert, *The Law of Trusts and Trustees* (2d ed. 1965), §111, at p. 562. *Accord: Solomon v. Boschulte*, 200 F.2d 482, 483 (3d Cir. 1952); *Garcia v. United States*, 421 F.2d 1213, 1232 (5th Cir. 1970); *Hackner v. Morgan*, 130 F.2d 300, 303 (2d Cir. 1942). Cf. *Newman v. C.I.R.*, 222 F.2d 131, 135 (9th Cir. 1955).

Third, petitioners seek to expropriate respondent's post-employment literary property and performance rights through the device of a breach of trust action. Historic facts are not the subject of property. Facts cannot be owned. It is the manifestation of ideas about facts which may be the subject of intellectual property. M.B. Nimmer, 1 *Nimmer on Copyright*, §2.11, pp. 2-157 to 2-158 (1979). Absent a contract thereon,[11] neither the United States nor its taxpayers own the fruits of the literary expression of a former federal officer — even if his post-employment works concern his former official duties. If the literary work was not created as a part of the officer's official duty — these post-resignation mem-

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[11]Cf. *United States v. Snepp*, 444 U.S. 507, 100 S.Ct. 763 (1980), *rehrg. den.* 100 S.Ct. 1668 (1980).

oirs clearly were not — then the Government has no rights in the proceeds of the sale of such literary property. See, *e.g.*, *United States v. First Trust Company of Saint Paul*, 251 F.2d 686, 688 (8th Cir. 1958); *Public Affairs Associates, Inc. v. Rickover*, 268 F.Supp. 444, 448-449 (D.C.D.C. 1967) (on remand from 369 U.S. 111, 82 S.Ct. 580); *Bell v. Combined Registry Co.*, 536 F.2d 164, 168-169 (7th Cir. 1976). See: §§101 and 105 of the Copyright Act (17 U.S.C. §§101 and 105).

The gist of petitioners' florid presentation is that the courts may punish former federal officials for political acts by expropriating their post-employment earnings from the writing of memoirs or the giving of lectures. [12] Before former federal officers are to be subjected to damage actions at the whim of federal taxpayers who attack the content of books which politicians write, there will have to be considerable change in contemporary notions of the First Amendment and in the laws defining the Government's rights in the literary works of former federal officers.

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[12]Why else would petitioners end their brief with the reference to the *Snepp* case (Amended Pet., p. 16) — the rule of which depends upon the special secrecy contract which Central Intelligence Agency officers made as a condition of employment in their covert official duties?

Conclusion.

For the reasons stated, this taxpayers' action is entirely without merit. The petition for writ of certiorari should be denied.

Respectfully submitted,

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